

Questioning the Judicial Service Commission's Role in Curbing Corruption amongst Judicial
Officers

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DEDICATION

To my Mum for her unwavering faith and constant encouragement

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DECLARATION

I, **SHEILA WAMBUI NDIHO**, do hereby declare that this research is my original work and that to the best of my knowledge and belief; it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

Date:

Dr Peter Kwenjera

ABSTRACT

Although it is true that corruption would negatively affect any organ, its effect on the judicial system cannot be overemphasized. This is due to the fact that the judiciary serves as a bulwark to the public against any encroachments on their rights and freedoms. As such, judicial independence is crucial to the functioning of any democracy. Historically, the biggest hindrance to judicial independence was the executive. This was in large part due to the degree of power that the repealed Constitution vested in the presidency. After the 2007 post election violence, it was clear that there was a desperate need for an independent judicial system that would promote the ideals of accountability and transparency.

This study contends that there is a symbiotic link between judicial corruption, judicial independence and the concept of separation of powers. Indeed, the study sought to prove that the lack of judicial independence and the failure to maintain the appropriate balance of power between the judiciary, executive and legislature, acts as contributory factors leading to judicial corruption. To this end, the study relied on both primary and secondary sources of data in order to examine the history, nature, causes of and extent of judicial corruption in Kenya. Further, it examined reform initiatives implemented post 2010 as well as the history of the Judicial Service Commission (JSC) and the various challenges plaguing the institution to date. Through an analysis of the JSC's powers of appointment, promotion, discipline and removal of judges, the study also reviewed international law with regards to the same.

The study concluded that although the JSC's mandates are at par with international best practices; that the JSC is at present not properly utilising the mandates accorded to it. Thus, the study recommends that certain incentives be introduced into the legal framework of the judiciary. These incentives *inter alia* include public awareness, amnesty and whistle blowing provisions and the strengthening of the judiciary fund.

LIST OF ABBREVIATIONS

CILCC	Civil Law Convention against Corruption
CKRC	Constitution of Kenya Review Commission
CUCs	Court User's Committees
EACC	Ethics and Anti-Corruption Commission
ICCPR	International Covenant on Civil and Political Rights
IT	Information Technology
JSA	Judicial Service Act
JSC	Judicial Service Commission
JTF	Judiciary Transformation Framework
KACC	Kenya Anti-Corruption Committee
KANU	Kenya National African Union
UNCAC	United Nations Convention against Corruption

LIST OF CASES

R v Sussex Justices, Ex Party McCarthy [1923] All ER223

Peter O. Ngoge & 4 Others [2007] eKLR

LIST OF CITED LEGISLATION AND INTERNATIONAL STATUTES

The Constitution of Kenya, 2010

Civil Law Convention against Corruption, 1999

European Charter on the Statute of Judges, 1998

Kenya Independence Order in Council (Repealed), 1963

Judicial Service Act, No 1 of 2011

Judiciary Fund Act, No 16 of 2016

Repealed Constitution of Kenya (1963)

United Nations Convention against Corruption, 2003

United Nations Basic Principles on the Independence of the Judiciary, 1985

Universal Charter of the Judge, 1999

CHAPTER ONE: INTRODUCTION

1.1 Background of the Study

The establishment of the judiciary can be traced back to the East African Order in Council of 1897 which adopted legislature that consisted of English statutes of general application, the common law of England, doctrines of Equity and some selected acts in application in India. The adoption of these new pieces of legislation consequently gave rise to the need for a judicial system that could interpret the new laws and resolve any disputes as a result of their reception in Kenya. Subsequently, the East African Order in Council established a justice system that was segregated and made up of superior and subordinate courts which adjudicated for the different classes of people.¹ The system was such that the indigenous people were marginalized in the Native Tribunals while the settlers were served by a court system made up of expatriate judges and magistrates. Essentially, the judicial system was dual in nature and was executed on the premise that one system administered colonial laws while the other resolved disputes among the indigenous population. At independence, the dual system was abolished and merged into one system. This did not however solve the issue of marginalization of the natives as the judiciary continued to be dominated by foreigners both in terms of personnel and practice. Furthermore, constitutional rule assigned the judiciary a narrow role that enabled the executive to control the judiciary. The judiciary was thus essentially a puppet of the executive and was designed to serve the interests of the government of the day.

The period between the introduction of multi-party politics in 1992 and the promulgation of the 2010 Constitution witnessed several attempts to restore credibility in the judiciary through the publication of at least twelve reports which outlined the problems plaguing the judiciary and gave recommendations on how best to solve them. However, most of these recommendations were not implemented which ultimately contributed to the public losing confidence in the judicial system.² In fact, it was not until the radical surgery was carried out in pursuance of the publication of the Ringera Report³ that an unprecedented step at cleaning the judiciary of corrupt practices was taken. The report cited poor terms and conditions of

¹ PLO Lumumba & Luis G Franceschi, 'The Constitution of Kenya 2010: An Introductory Commentary,' 2014, Strathmore University Press, 468.

² The Judiciary, 'Judiciary Transformation Framework: 2012-2016', 9.

³ Otherwise known as the Report of the Integrity and Anti Corruption Committee.

service and the existence of wide discretion on the part of judicial officers amongst others as the principal causes of judicial corruption. It further implicated a total of 105 judicial officers including 23 judges and 82 magistrates in judicial corruption and made recommendations that the named judges and magistrates should resign or face criminal prosecution.⁴ However, the manner in which the process was conducted was met with a lot of criticism particularly in light of the fact that the media published the names of the implicated judges and magistrates in a ‘List of Shame’ before they were informed of the allegations made against them in the report.⁵ The threats issued by the Acting Chief Justice that those implicated should resign or face a tribunal and the withdrawal of benefits such as pay was also considered to undermine judicial independence and the right to due process.⁶ Thus, the measures taken to address judicial corruption were viewed as being suboptimal and ultimately failed to restore public confidence in the judiciary.

Since the removal of judicial officers by way of the Ringera Report, little progress towards the reformation of the judiciary was made until the enactment of the 2010 Constitution which aimed at strengthening the JSC, a body bestowed with the responsibility of promoting and facilitating the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice. The establishment of the JSC was intended to be the ultimate solution in ensuring a fair and transparent process of appointing and disciplining judicial officers.⁷ Even so, judicial corruption still continues to take place as seen vide a press statement released by the former Chief Justice Willy Mutunga where he stated that the vice had crept back into the judicial system.⁸

1.2 Statement of the Problem

Despite the enactment of vast legislation on the competence of the JSC in ensuring that judicial processes are transparent and free of external interference, judicial corruption still continues to

⁴ Presentation of the Honourable Mr Justice (Rtd.) Aaron G. Ringera, Director & Chief Executive of the Kenya Anti-Corruption Commission, ‘Corruption in the Judiciary,’ 25th April 2007, The World Bank, Washington D.C, 12.

⁵ Judges and Magistrates Vetting Board, ‘Restoring Public Confidence in the Judiciary: first Report of the Kenya Judges and Magistrates Vetting Board’ [2012] eKLR, 3.

⁶ ‘Restoring Public Confidence in the Judiciary: first Report of the Kenya Judges and Magistrates Vetting Board’ [2012] eKLR, 3.

⁷ M Kiwinda Mbonenyi & J Osogo Ambani, ‘The New Constitutional Law of Kenya: Principles, Government and Human Rights,’ Claripress Ltd, Nairobi, 2012, 150.

⁸ Benard Sanga, ‘A Third Purge? CJ Willy Mutunga and Lawyers Decry Increase Corruption in the Judiciary,’ accessible at < <http://www.standardmedia.co.ke/article/2000172075/a-third-purge-cj-willy-mutunga-and-lawyers-decry-increase-corruption-in-the-judiciary>> on August 8th 2015.

take place. The problem sought to be addressed is thus whether the JSC's mandates as envisaged in the 2010 Constitution are effective in eradicating judicial corruption.

1.3 Justification of the Study

The presence of a few corrupt judges in the judicial sector has led to the public losing confidence in the ability of judges to render independent and impartial decisions based solely on the law and the facts presented without interference from the state. Public confidence in the moral authority and integrity of the judiciary is of the utmost importance in a modern democracy. The judiciary must be the safe haven where every citizen may find support for his or her legal rights when they conflict with those of the rich and powerful in society.⁹

The JSC is expected to play a key role in ensuring that the judiciary maintains its role as a safe haven in society. Its purposes are stipulated under Article 172 of the 2010 Constitution and include promoting and facilitating the independence and accountability of the judiciary and the effective and transparent administration of justice; recommending to the President persons for appointment as Judges; receiving complaints against, investigating and removing from office or otherwise disciplining registrars, magistrates, other judicial officers and other staff of the judiciary amongst other roles. The JSC is therefore well poised to protect the sovereignty of the people, secure the observance by the judiciary of democratic principles and values and promote constitutionalism.¹⁰ It is thus surprising that judicial corruption still continues to occur as was evidenced by the former Chief Justice Willy Mutunga's statement referenced earlier where he noted that corruption had crept back into the judicial system. It is apparent that there is a lacuna in practice and that there is a great need to investigate the instances of judicial corruption and why it is not being addressed by the JSC which is mandated to provide a solution.

1.4 Statement of Objective(s)

This study is designed to focus on two objectives. These are to:

- i. Determine the causes of judicial corruption over the years
- ii. Assess whether the role of the JSC will impact on the levels of judicial corruption.

⁹ Joshua Lam (2011) Judicial Corruption, A paper presented at the Vetting Workshop in Eldoret, hosted by Transparency International, Kenya on 17th December 2011.

¹⁰ Article 249 of the Constitution of Kenya [2010].

1.5 Research Question (s)

The main questions that this research seeks to answer are:

- a) Is the mandate of the JSC as anchored in Article 172 of the 2010 Constitution effective in solving the problem of judicial corruption?
- b) What are the reasons for its ineffectiveness?
- c) What can be done to better their implementation?

1.5.1 Research Methodology

The research has applied both primary and secondary sources of data. The researcher began by examining primary sources as the materials provided a first hand look at the study. In this regard, the researcher employed the use of statutes such as the Judicial Service Commission Act (2011), the Constitution of Kenya (2010) and the repealed Constitution of Kenya (1963). The researcher then employed the use of secondary sources of data which offered an analysis and explanation of the primary sources and included: books, journals, reports, websites and scholarly articles on the subject. These materials were mainly sourced from the Strathmore University Library. In so far as online resources are concerned, the researcher mainly relied on google scholar. These modes of research were employed for two main reasons. Firstly, they saved a lot of time due to their easy accessibility. Secondly, they provided a comparative analysis of the study through the review of different writer's views on the subject.

1.6 Literature Review

The documents used in this regard included books, journal articles, statutes, government reports, research papers, reports, internet resources, cases, media records and surveys. The literature considered mainly touched on the area of judicial independence. This is due to the fact that the lack of judicial independence and impartiality has historically been viewed as one of the core causes of judicial corruption. This point is put across by numerous authors including Ochich who blamed the practice of judicial corruption on the executive control of the judiciary since post-colonial days.¹¹ Similarly, Charles Manga argues that the only way that modern constitutionalism, democracy and good governance can be achieved is through judicial independence. He attempts to provide a solution to judicial corruption by listing judicial autonomy, security of judicial office, financial security of judicial offices, transparent mechanisms for judicial appointments, and judicial accountability as necessary requirements

¹¹ Ochich, G. 'The changing paradigm of Human Rights Litigation in East Africa' cited in Reinforcing Judicial and Legal Institutions: Legal Institutions, 29.

for maintaining an independent judiciary.¹² Manga's assertion on the conditions for fulfilling judicial independence is crucial because without adequate funds for instance, the judiciary will not be able to perform its functions efficiently and may become vulnerable to undue outside pressures and corruption. A similar line of thought is drawn from the Bangalore Principles¹³ which outlines security of tenure, financial security and institutional independence as being core elements in achieving judicial independence.

The research also considered sources of literature which provided historical accounts of both the judiciary and the JSC such as PLO Lumumba and Luis G Franceschi's 'The Constitution of Kenya 2010'¹⁴ as well as M. Kiwinda Mbondenyi and J. Osogo Ambani's 'The New Constitutional Law of Kenya.'¹⁵ The two books argue that the lack of efficiency in both constitutional organs was due to a lack of independence from the executive arm of government. Ambani and Mbondenyi for instance argue that under the repealed Constitution, the JSC was not an independent body but was incidentally composed of five members who were considered 'insiders' due to the fact that they owed their positions to the President.¹⁶ Kameri Mbote and Migai Akech agree on the same but add that the previous lack of constitutional or statutory provisions giving financial autonomy to the JSC to facilitate the discharge of its functions also resulted in its organisational and operational weaknesses.¹⁷

Additionally, the research also utilised the unpublished Master in Law (LLM) thesis of Roseline Oganyo titled the '*Justiciability of Justice: The Role of the Judicial Service Commission in Kenya in the Decisional Independence of Judicial Officers*'¹⁸ which primarily focused on judicial independence. Her dissertation examined the extent to which the judiciary is independent particularly after the promulgation of the new Constitution. It also sought to make an assessment as to the effectiveness of the new structures in the sustenance of judicial independence. Thus, our dissertations were similar insofar as they focused on judicial

¹² Charles Manga Fombad, 'A Preliminary Assessment of the Prospects for Judicial Independence in Post – 1990 African Constitutions' [2007] Public Law, 35-40.

¹³ The United Nations Office on Drugs and Crime, 'A Commentary on the Bangalore Principles of Judicial Conduct,' September 2007.

¹⁴ PLO Lumumba & Luis Franceschi, 'The Constitution of Kenya, 2010: An Introductory Commentary,' Strathmore University Press, Nairobi, 2014.

¹⁵ M Kiwinda Mbondenyi & J Osogo Ambani, 'The New Constitutional Law of Kenya: Principles, Government and Human Rights,' ClariPress Ltd, Nairobi, 2012.

¹⁶ Kiwinda et al, 'The New Constitutional Law of Kenya,' 152.

¹⁷ Patricia Kameri Mbote and Migai Akech, 'Kenya Justice Sector and the Rule of Law: A Review by AfriMAP and the Open Society Initiative for Eastern Africa,' March 2011, 100.

¹⁸ Oganyo Roseline Akinyi, '*Justiciability of Justice: The Role of the Judicial Service Commission in Kenya in the Decisional Independence of Judicial Officers*,' Published LLM Thesis, University of Nairobi, October 2014.

independence as a critical theme in informing our respective dissertations. However, the two differed in that Roseline Oganyo's was premised on the fact that the JSC was an impediment towards achieving judicial independence as it exercises arbitrary powers over the judiciary. Contrastingly, my dissertation seeks to demonstrate that the JSC's mandates are critical in establishing judicial independence and in fact, the lack of judicial independence can be attributed to the JSC's ineffectiveness in properly utilising the mandates accorded to it.

The research also relies on the Report of the Constitution of Kenya Review Commission (CKRC)¹⁹ which played a key role in informing Article 172 of the 2010 Constitution²⁰ and the Final Report of the Task Force on Judicial Reforms²¹ which provided a list of the various forms of judicial corruption which included bribery, fraud, abuse of judicial official and receiving of favours through gifts and free transport. The Task Force moreover recommended developing a corruption prevention policy within the judiciary to guide all the anti-corruption initiatives in the institution and removing all judicial officers and staff found liable for corruption by the JSC as effective means of curbing judicial corruption.²²

1.7 Hypothesis

The study is anchored on the following hypothesis:

- The objectives of the Judicial Service Commission as laid out in Article 172 of the 2010 Constitution are not an effective mandate in solving the problem of judicial corruption.

1.8 Limitations

The method of research adopted generated an adequate amount of information. However, this information was sometimes directed to other areas such as vetting of magistrates as a means to curb judicial corruption among magistrates and other judicial staff such as clerks which was not necessarily what the researcher had in mind when conducting the study.

1.9 Chapter Breakdown

Chapter One has provided an overview of the study. The second Chapter will discuss the theoretical framework that the researcher relied on. The third chapter will discuss the historical limitations of the JSC and its role of controlling the judiciary under the independence

¹⁹ Constitution of Kenya Review Commission, *Final Draft*, 2005.

²⁰ The Constitution of Kenya, 2010.

²¹ The Final Report of the Task Force on Judicial Reforms, 2010.

²² The Final Report of the Task Force on Judicial Reforms, 2010, Government Printer, Nairobi, 77-78.

Constitution. In Chapter Four, the statutory framework under which the appointment, discipline and removal of judicial officers is effected by the JSC under the 2010 Constitution will be discussed. Chapter Five will provide an analysis of the level of judicial corruption post 2010. The Chapter will also outline the various challenges preventing the JSC from ensuring that judicial corruption is eradicated. The last Chapter will analyse the attempts made to curb judicial corruption. It will also summarise the study, draw conclusions and make recommendations on the way forward.

CHAPTER TWO: CONCEPTUAL FRAMEWORK

The conceptual framework shall be handled under various themes.

2.1. Corruption

The concept of corruption is a broad one. There is no singular definition of what constitutes corruption. However, corruption has been defined in vague terms as the abuse of entrusted power for private gain. The common consensus at the global level seems to be that corruption is divided into grand and petty corruption. Grand corruption generally consists of acts committed at a high level of government that distorts policies or the proper functioning of the state enabling leaders to benefit at the expense of the public good while petty corruption refers to everyday abuse of entrusted power by low and mid-level public officials in their interactions with ordinary citizens who are often trying to access public goods and services.²³ Summarily, grand corruption involves the highest level of government while petty corruption involves the exchange of money or the transfer of favours at lower levels of government.

The term corruption is also explicitly defined in the Civil Law Convention against Corruption (CILCC) of 1999 as “requesting, offering, giving or accepting, directly or indirectly, a bribe or any other advantage or prospect thereof which distorts the proper performance of any duty.”²⁴ Other international instruments such as the United Nations Convention against Corruption (UNCAC) of 2003 do not define corruption but list certain acts such as intentional active and passive bribery, deliberate embezzlement and abuse of functions as being practices which are corrupt in nature.²⁵ Similarly, institutions such as the Kenya Anti-Corruption Commission (KACC) do not define corruption save for listing bribery given either in cash or kind as a type of corruption and to list the forms that corruption can take such as: gifts of land, livestock, the supply of fuel, harambee contributions, sexual favours, personal entertainment and hospitality.²⁶

²³ Transparency International, The Global Coalition against Corruption, ‘How Do You Define Corruption?’, available at <https://www.transparency.org/what-is-corruption/#define>.

²⁴Article 2, Civil Law Convention against Corruption, CETS No. 174, adopted by the Council of Europe, Strasbourg 1999.

²⁵Articles 2- 3, The United Nations Convention against Corruption, General Assembly resolution 58/4 of 31 October 2003.

²⁶ James Sitinei, Kenya Anti-Corruption Commission, ‘On the Frontline Against Corruption,’ University of Passau, October 2010 <http://www.icgg.org/downloads/2010/Sitinei.pdf>.

For the purposes of this research, judicial corruption can be understood as any act or omission by a judge, court official or other person within the judiciary which leads to unjust court decisions.

2.2 Judicial Independence

The judiciary is one of the three arms of government. It is the branch of government which administers justice according to the law. It is also the institution that is charged with the role of applying the law, settling disputes and punishing law-breakers in accordance with the law. Citizens look to the judiciary to uphold their rights and governments look to the judiciary to interpret the law. For the judiciary to fulfil its mandate as is to be expected, it must be independent. The public must have confidence in the institution. This is due to the fact that the delivery of the judiciary's objectives depends on public perception as is indeed echoed in the adage, "justice must not only be done but must be seen to be done."²⁷

In Constitutional theory and practice, the independence of the judiciary is the most important element of the rule of law and is closely related to the separation of powers. Although judicial corruption has many causes, the conceptual framework is founded on the idea that judicial corruption cannot be solved without ensuring that judicial independence and the doctrine of separation of powers are well established principles.

The concept of judicial independence is anchored within the Bangalore Principles²⁸ in which it is defined as a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. The Bangalore Principles go on to state that a judge should thus uphold and exemplify judicial independence both individually and institutionally.²⁹ With respect to the application of judicial independence, the Bangalore Principles state that:

- i. A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.³⁰

²⁷ R v Sussex Justices, Ex Party Mc Carthy (1923) All ER 223.

²⁸ Judicial Group on Strengthening Judicial Integrity, 'The Bangalore Draft Code of Judicial Conduct,' Round Table Meeting of Chief Justices, Peace Palace, The Hague, November 25-26, 2002.

²⁹ Value 1, The Bangalore Principles, 2002.

³⁰ Value 1.1, The Bangalore Principles, 2002.

- ii. A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.³¹
- iii. A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom. ³²
- iv. In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently. ³³
- v. A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary. ³⁴
- vi. A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence. ³⁵

The Bangalore Principles are perhaps the key source of material regarding judicial independence as they emphasize the fact that confidence in the judiciary is eroded if judicial decision-making is perceived to be subject to inappropriate outside influences.³⁶ They thus endeavour to pinpoint guidelines to assist judges to avoid outside influences from colouring their judgement.

Article 10 of the Universal Declaration of Human Rights (1948) borrows from the Bangalore Principles where it states the following: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” The same principle has been further stated in Article 14 of the International Covenant on Civil and Political Rights (ICCPR) that was adopted in 1966 that states, “All persons shall be equal before the courts and tribunals in the determination of any criminal charge against him or of his rights and obligations in a suit at law. Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” In the Kenyan context, it is stipulated under Article

³¹ Value 1.2, The Bangalore Principles, 2002.

³² Value 1.3, The Bangalore Principles, 2002.

³³ Value 1.4, The Bangalore Principles, 2002.

³⁴ Value 1.5, The Bangalore Principles, 2002.

³⁵ Value 1.6, The Bangalore Principles, 2002.

³⁶ The United Nations Office on Drugs and Crime, ‘A Commentary on the Bangalore Principles of Judicial Conduct,’ September 2007, 42.

50(1) of the Constitution of Kenya where it provides that, “Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body.”

The concept of judicial independence is essential to the functioning of any democracy. It is one of the cornerstones of democracy. Individuals involved in any kind of case before the court need to be sure that the judicial officer dealing with their case cannot be influenced by any outside party or by their own personal interests. The importance of judicial independence is illustrated in Yash Pal Ghai’s remarks where he stated that,

“The judiciary must be the bastion of where citizens may go to challenge the arbitrary or oppressive actions of the state. It must be the safe haven where the most impoverished or abused citizen may find support for his or her rights when they conflict with those of the rich and powerful in the society. A court of law is the forum where corrupt police officers and government officials may be brought in order to condemn their misconduct and impose punishment for their abuse of trust. Where justice is not dispensed with impartiality there is no hope for citizens to be treated with objectivity, fairness and honesty by other institutions.”³⁷

2.3 Separation of Powers

Judicial independence is incomplete unless it is accompanied by the institutional independence of the judiciary. This concept is founded on the idea of separation of powers. Under the doctrine of separation of powers, government responsibilities are divided into three distinct branches so as to limit any one branch from exercising the core functions of another. Classically, the three arms of government are the executive, legislature and judiciary. The executive is primarily charged with implementing and administering the law. The legislative branch with enacting the laws of the State and the judicial arm, with interpreting the Constitution and other laws and applying their interpretations to controversial situations

The theoretical foundation of the doctrine of separation of powers can be traced in Montesquieu’s Spirit of the Laws. In his publication, he ascribed to the thinking that there could be no liberty if the powers of judging were not separated from the legislature and executive.³⁸ He argued that the only way to prevent justice from becoming arbitrary was to divide

³⁷ Yash Pal Ghai, ‘Constitutions and Governance in Africa: A prolegomenon in Sammy Adelman et al (ed) Law and Struggle for Democracy in East Africa, Claripress, Nairobi, 1996, 341-361.

³⁸ B de Montesquieu, ‘The Spirit of the Laws,’ trans T Nugent (1949).

government power among entrusted parties who would check one another. The separation of powers is seen as a vital safeguard against corruption as it acts as a system of checks and balances such that no arm of government is given unchecked power in its sphere. However, whilst separation of powers is essential to the workings of any government, no democratic society exists with an absolute separation of powers or an absolute lack of separation of powers. Government powers and responsibilities intentionally overlap. There are too complex and interrelated to be neatly compartmentalized. Their functions are interrelated and independent of each other. As a result, there is an inherent measure of competition and conflict among the branches of government.

In the Kenyan context, the lack of separation of powers was a key cause of judicial corruption. After independence in 1963, Kenya African National Union (KANU) was the only political party within Kenya. KANU embarked on constitutional amendments that were meant to vest all the power in the executive. Although, the constitutional regime provided for a tripartite system composed of the executive, legislature and judiciary, the system was unequal and the independence of the judiciary remained elusive both in law and practice.³⁹ Under Article 23(1) of the independence Constitution, executive authority of the State was vested in the President thus robbing the citizens of the sovereign authority of the country. Additionally, the independence Constitution failed to provide for the independence of the judicial organ in the same manner that it provided for the legislative and executive arms of government.

This situation was illustrated in the case of *Peter O. Ngoge v Francis Ole Kaparo and Others* where it was held that it was not the work of the court to interfere with the internal arrangement of parliament unless it can be shown that they violate the constitution.⁴⁰ The lack of constitutional provisions addressing the institutional independence of the judiciary also resulted in the appointment of judges by the President without consultation from the JSC thus enabling the President to appoint temporary judges who enjoyed no security of tenure and were susceptible to manipulation.⁴¹ Further, the sovereignty of the citizens was undermined as constitutional amendments on crucial matters such as alteration of the Constitution was done without involving the citizens as was stipulated under Article 47 of the repealed constitution.

³⁹ Kiwinda et al, 'The New Constitutional Law of Kenya,' 68.

⁴⁰ Peter O. Ngoge & 4 Others [2007] eKLR.

⁴¹ Kiwinda et al, 'The New Constitutional Law of Kenya,' 69.

2.4 Conclusion

The advent of the New Constitution of Kenya, 2010 provided an opportunity for the judiciary to address the issues that had for many years frustrated the delivery of justice. Indeed, the 2010 Constitution provided certain safeguards against judicial corruption. For instance, Article 2 of the 2010 Constitution, bestowed sovereign power in the people. Article 10 of the same provided the guiding principles of governance which included the rule of law, democracy, accountability and social justice among others. Article 159 (2) of the 2010 Constitution stipulated that judicial authority comes from the people of Kenya and is exercised by courts and tribunals on their behalf. Article 160 (1) addressed the independence of the judiciary and guaranteed the separation of powers. Further, the role of the JSC was strengthened and it was mandated to ensure judicial independence and transparency of judicial process.

However, despite all the changes that came about with the advent of the 2010 Constitution, judicial corruption still continues to occur. This study thus seeks to find out whether Article 172 of the Constitution of Kenya, 2010 has achieved its objectives which among others, is taming the culture of corruption in the judiciary. The study also seeks to assess the extent to which judicial corruption in Kenya is perpetrated by judicial officers.

CHAPTER THREE: HISTORY OF THE JUDICIAL SERVICE COMMISSION

3.1. JSC under the Westminster Constitution

The JSC was first established under the Westminster Model Constitution as an independent body not to be subject to the direction or control of any person or authority.⁴² The Westminster model was the Constitution that was negotiated upon Kenya attaining independence in 1963.⁴³ Under the Westminster model, membership of the Commission consisted of the Chief Justice as chairman, two persons appointed by the Governor General on advice from the Chief Justice and lastly, two persons appointed by the Governor General on advice by the Chairman of the Public Service Commission.⁴⁴ Further, the JSC could regulate its own procedure but this was subject to the Prime Minister in the case of a public officer serving on the establishment of the Government of Kenya or the President of the Regional Assembly in the case of a public officer serving on the establishment of a Region or in the case of any authority of a Region.⁴⁵ The functions of the Commission were the appointment, discipline and dismissal of magistrates, Kadhis, judges and other members of the subordinate courts.⁴⁶

It is apparent that the Westminster constitutional arrangement was effective in creating a judiciary that was *inter alia* independent, non-partisan and which was guided by values of ethics, impartiality, effectiveness and discipline.⁴⁷ This is evident in the structure of the JSC established under the latter system given that majority of the members were appointed following the requisite checks and balances with some input from the legislative arm of government. As such, its members were not direct executive appointees as to a large extent; membership was devoid of executive presence. Further, the JSC was granted great powers to appoint and dismiss judges. This served as a threat to the interests of the government of the day which held judicial independence in a very low regard as it was more concerned with consolidating power and dominating citizens.⁴⁸

⁴² Section 184 (2) Kenya Independence Order in Council of 1963.

⁴³ Julie Ouma Oseko, *Judicial Independence in Kenya: Constitutional Challenges and Opportunities for Reform*, Published PHD Thesis, University of Leicester, November 2014, 103.

⁴⁴ Section 184 (1) Kenya Independence Order in Council of 1963.

⁴⁵ Section 184 (3) Kenya Independence Order in Council of 1963.

⁴⁶ Section 185 Kenya Independence Order in Council of 1963.

⁴⁷ C. Odhiambo Mbai, 'Public Service Accountability and Governance in Kenya Since Independence,' 2003, 8 African Journal of Political Science, 118-119.

⁴⁸ M J C Vile, 'Constitutionalism and the Separation of Powers, Clarendon Press, Oxford, 1967, 20.

Therefore, it is not surprising that the Westminster Constitution only lasted from the year 1963 to 1964 before a multitude of constitutional amendments began that saw the consolidation and over-concentration of legitimate power and authority in the executive arm of the government. Notably, this was due to the view of numerous African leaders of former British colonies including the then Prime Minister Jomo Kenyatta that the dual system posed a foreign idea which had no place in African history, tradition and society and further, that the notions of individual rights and separation of powers were incomprehensible to the African masses.⁴⁹ The executive established under the Westminster model was dual in nature and was exercised within two centres. In this system, Kenya's government was led by a governor general who exercised real executive power on behalf of the Queen of England who still maintained executive power as the head of state and; a prime minister who was responsible for the day to day running of the government assisted by the government.⁵⁰ Majority of the African leaders argued that a dual executive was a function of 'class conflicts' and since traditional African societies were classless and driven by a desire for consensus, such a duality was untenable and only a single undivided executive was functional in such a society.⁵¹

Additionally, all Westminster constitutions imported into Africa were almost exclusively concerned with state institutions, separation of power, the rule of law, power distribution and limitation, judicial independence and the protection of fundamental rights and freedoms-- Bills of Rights were written into constitutions not as minimum prescriptions of justice and good governance but as limitations on government power.⁵² The structuring of the Westminster Constitutions in this form sparked an urgency to amass more power and gain political domination by the leaders of that time. At the time, the argument posed was that the notions of individual rights and separation of powers were 'un-African.' Subsequently, upon Kenya attaining independence in 1963, the Constitution was amended such that the legislature and executive were answerable to the judiciary and the system of checks and balances as had been established by the Westminster Constitution was eradicated. These sentiments are echoed by Kimondo in his journal article 'Constitutional Amendments Between 1964-1990' where he stated that the constitutional reforms were:

⁴⁹ Okon Akiba, 'Constitutionalism and Society in Africa,' Ashgate Publishing, Aldershot, 2004, 9.

⁵⁰ Joshua M. Kivuva, 'Restructuring the Kenyan State,' Constitutional Working Paper Series No.1, Society for International Development (SID), 4.

⁵¹ Joshua M. Kivuva, 'Restructuring the Kenyan State,' 4.

⁵² H.W.O Okoth Ogendo, 'The Politics of Constitutional Change in Kenya Since Independence, 1962-1969,' African Affairs, Vol 71, No. 282 (Jan 1972), 9.

“..Largely executive minded...aimed at gaining advantages over political opponents. This was through increased executive power and diminution of the capacity and stature of institutions meant to checks and balances to that power, such as the judiciary, parliament and political parties. The period was also marked by the insistence of the government of the day that...public law generally should not impede governmental action.”⁵³

3.2 JSC under the Independence Constitution

The JSC established under the Independence Constitution comprised of the Chief Justice as Chairman, the Attorney General, a representative from the High Court, a representative from the Court of Appeal and the Chairman of the Public Service Commission (PSC).⁵⁴ The Constitution under Article 68(2) provided that the Commission would not be subject to the direction or control of any other person or authority. Furthermore, the powers of appointment, discipline, and dismissal of members of the judiciary were vested in the Judicial Service Commission.⁵⁵ However, the members of the Commission were direct appointees of the President which called into question the independence of the Commission.

Moreover, the former Constitution was silent on the requirements necessary for the appointment of members of the JSC. In particular, it was not clear whether members of the Commission needed to satisfy prerequisite qualifications such as having certain standards of integrity and experience. Thus, the President could exercise considerable influence over the appointment process.⁵⁶

Additionally, the process of removal of judges did not reflect independence on the part of the members of the Commission. Under the previous Constitution, judges could only be removed on account of inability to perform the functions of the office or misbehaviour.⁵⁷ However, the process was such that only the Chief Justice could report such information to the President and not the JSC as an independent institution.⁵⁸ The Constitution further mandated that the President thereafter appoint a tribunal to investigate the matter and recommend the removal of

⁵³ G. Kanyi Kimondo, ‘Constitutional Amendments Between 1964-1990 in K. Kibwana *et al* (eds):*The Citizen and the Constitution*,’ Claripress, Nairobi, 1996, 39-40.

⁵⁴ Article 68 (1), *Repealed Constitution of Kenya* (1963).

⁵⁵ Article 69(1), *Repealed Constitution of Kenya* (1963).

⁵⁶ Mona Rishmawi *et al* (ed), ‘The Harrassment and Prosecution of Judges and Lawyers, 10th edition, Centre for Independence of Judges and Lawyers (CIJL) of the International Commission of Jurists (ICJ), Geneva, 2000, p251

⁵⁷ Article 62(4), *Repealed Constitution of Kenya* (1963).

⁵⁸ Article 62 (5), *Repealed Constitution of Kenya* (1963).

the judges.⁵⁹ This Constitutional provision further evidenced the lack of judicial independence and the fact that the JSC was over reliant on the office of the President.

The fact that the JSC was largely ignored by the executive under the Repealed Constitution is further evidenced by the carrying out of the radical surgery which was done pursuant to the release of a report by the Integrity and Anti-Corruption Committee. As previously stated in Chapter One, the report outlined various instances of corruption within the judiciary and in an unprecedented step named judicial officers implicated in the alleged corrupt practices. A total of 105 judicial officers including 23 judges and 82 magistrates were named in the report and accused of among other things; demanding and accepting cash bribes, sexual favours and free transport in exchange for partisan judgements.⁶⁰ However, the radical surgery was carried out with a very limited input from the JSC which should have ideally taken up the task as it was the body constitutionally mandated to remove judicial officers.

3.3 JSC under the 2010 Constitution

Under the 2010 Constitution, the JSC derives its mandate under Article 171. In addition to appointing, disciplining and removing judicial officers, the JSC is also mandated to review and make recommendations on the conditions of service of judicial officers other than on terms of remuneration, implementing programmes for the education and training of judges and judicial officers and advising the national government on improving the efficiency of the administration of justice.⁶¹

The Commission is composed of eleven members who include: a) The Chief Justice who shall act as Chairperson; b) one Supreme Court judge elected by the judges of the Supreme Court; c) one Court of Appeal judge elected by the judges of the Court of Appeal; d) one High Court judge and one magistrate, one of whom is a woman and the other a man, both of whom are elected by members of the association of judges and magistrates; e) the Attorney-General; f) two advocates, one of whom is a woman and another, a man, each of whom with at least fifteen years' experience elected by the members of the statutory body responsible for the professional regulation of advocates; g) one person nominated by the Public Service Commission; and h)

⁵⁹ Article 62 (5) (b), *Repealed Constitution of Kenya* (1963).

⁶⁰ Report of the Integrity and Anti-Corruption Committee, 'An Anatomy of Corruption in Kenya.'

⁶¹ Article 172, *The Constitution of Kenya* (2010).

one woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly.⁶²

The JSC established under the 2010 Constitution is viewed as being more transparent especially due to the fact that the members of the Commission now include representatives of the public and legal profession as well as members of different levels of the court. Moreover, the Chief Justice, Deputy Chief Justice, judges and magistrates were appointed after a rather rigorous process whereby interviews were conducted in the open and aired live by the media. The public was even allowed to send in their comments, questions and opinions to the interview panel which then directed the questions to the interviewees. This was in accordance with the guiding principles of the JSC articulated in Article 172 (2) which included among others the transparent processes of appointment of judicial officers and other staff of the judiciary.

Indeed, the institutionalization of the JSC as an independent commission with the mandate of appointment, promotion, discipline and dismissal of judges is now manifested both in practice and within the Constitution of Kenya, 2010. However, it is arguable that by granting the JSC exclusive powers to appoint, promote, discipline and dismiss judges, the Constitution has given the Commission too much power that could potentially interfere with the independence of individual judges. Chapter Four shall discuss the statutory framework under which the appointment, discipline and removal of judicial officers is effected by the JSC under the 2010 Constitution.

⁶² Article 171, *The Constitution of Kenya* (2010).

CHAPTER FOUR: STATUTORY FRAMEWORK OF THE JSC'S POWERS OF APPOINTMENT, PROMOTION, DISCIPLINE AND REMOVAL OF JUDGES

The functions of the JSC are to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice.⁶³ In particular, the JSC's mandate relates to the appointment of judges, discipline of judicial officers as well as training and advising the government on how to improve the administration of justice.⁶⁴ Furthermore, the JSC is mandated to make regulations that would facilitate its proper functioning. This includes developing a code of conduct, financial processes, training and performance appraisal of judicial staff which upon completion are presented to parliament for approval. This Chapter thus seeks to provide the statutory framework by which the JSC facilitates the appointment, promotion, discipline and removal of judges.

4.1. Appointment and Promotion of Judges

The Judicial Service Act (JSA) provides an elaborate procedure for the appointment of judges which is guided by transparency.⁶⁵ According to the First Schedule of the JSA, the JSC begins the process by first advertising the vacancies on their website. A similar notice is also sent to the Law Society of Kenya, the Kenya Gazette as well as any other lawyers' professional association. The applicants are thereafter invited for interviews.⁶⁶

The names of the applicants are publicised in the form of a press release and a post on the Commission's website with the public being invited to give their views on the prospective candidates.⁶⁷ The candidates are then interviewed in public to allow for transparency and public participation.⁶⁸ Whilst determining the qualifications of the applicants, the Commission is guided by professional competence which comprises intellectual capacity, legal judgement, written and oral skills, diligence, substantive and procedural knowledge of law, organisational and administrative skills and the ability to work well with a variety of people.⁶⁹ The Schedule makes further mention of the skills that constitute each of the latter elements. For instance when determining whether a candidate possesses written and oral skills, the Commission shall

⁶³ Article 172, Constitution of Kenya (2010).

⁶⁴ Article 172(1), Constitution of Kenya (2010).

⁶⁵ Section 30, Judicial Service Act (2011).

⁶⁶ Section 3, First Schedule of the Judicial Service Act (2011).

⁶⁷ Section 9, First Schedule of the Judicial Service Act (2011).

⁶⁸ Section 10, First Schedule of the Judicial Service Act (2011).

⁶⁹ Section 13 (a), First Schedule of the Judicial Service Act (2011).

evaluate the candidates' ability to discuss factual and legal issues in clear, logical and accurate legal writing.⁷⁰

After the conclusion of the public interview, the Commission deliberates and nominates the most qualified applicants.⁷¹ In order for an applicant to be nominated for recommendation for appointment, they must receive three or more affirmative votes.⁷² Notably, while the initial interview is public, there is no mention of the process of deliberations being made public nor is there a requirement that the Commission give reasons for their recommendations. Thereafter, the names of the persons nominated for recommendation for judicial appointment are forwarded to the President.⁷³

Promotion on the other hand relates to the conferment of a person in the public service to an office which is attached a higher salary or higher salary scale than that attached to the office to which he was last substantively appointed.⁷⁴ The JSA stipulates that while selecting candidates for promotion, the Commission shall have regard to merit, ability, seniority, experience and official qualification. However, proved merit and suitability for vacancies in question shall be given greater weight than seniority. Further, the Commission shall also consider the gender, regional, ethnic and other diversities of the People of Kenya.⁷⁵

4.2 Discipline and Removal of Judges

The Constitution of Kenya 2010 provides for a code of conduct for public officers within its Chapter Six. Chapter Six concerns leadership and integrity and stipulates that state officers shall behave in a manner that avoids conflicts of interest or any behaviour that demeans the office with which the officer holds. Disciplinary measures in the form of removal or dismissal are meted out for officers who contravene the principles set out in Chapter Six.⁷⁶ Chapter Six is also mirrored within the Leadership and Integrity Act of 2012 as well as the Public Officer and Ethics Act of 2003.

As for the removal of judges, Article 168 (1) of the 2010 Constitution stipulates that a judge may only be removed from office on the grounds of incapacity, bankruptcy, incompetence,

⁷⁰ Section 13 (b), First Schedule of the Judicial Service Act (2011).

⁷¹ Section 14(1) of the First Schedule of the Judicial Service Act (2011).

Notably, the nomination must take place within seven days following the conclusion of the interviews.

⁷² Section 14(5), First Schedule of the Judicial Service Act (2011).

⁷³ Section 15 (2A), First Schedule of the Judicial Service Act (2011).

⁷⁴ Section 2, Third Schedule of the Judicial Service Act (2011).

⁷⁵ Section 10, Third Schedule of the Judicial Service Act (2011).

⁷⁶ Article 75, the Constitution of Kenya (2010).

gross misconduct or through a breach of a code of conduct prescribed for judges by an Act of Parliament. Removal proceedings may only be initiated by the JSC acting on its own motion or on the petition of any person to the JSC.⁷⁷ Thus, it follows that the JSC is the sole body responsible for disciplining and removing judges. In order to aid the JSC in doing so, the Judicial Service Act (JSA) was enacted in 2011. The JSA provides for a number of sanctions which may be inflicted as a result of disciplinary proceedings. These sanctions include interdiction, suspension, dismissal, stoppage of increment of pay, withholding of increment, and deferment of increment, severe reprimand and the recovery of the cost or part of the cost of any loss or breakage caused by default or negligence provided that no such cost has been recovered by surcharge action under the appropriate financial instructions or regulations.⁷⁸

With regards to the procedural aspect of dismissal, the Chief Justice where he deems it fit to institute disciplinary proceedings against a judicial officer on the grounds of misconduct is mandated to issue a notice to show cause detailing the nature of the offence and giving the officer a specified period to state in writing any grounds which he wishes to rely on to exculpate themselves.⁷⁹ Misconduct in this case relates to idling during working hours, failure to account for monies advanced, misuse of office resources such as the telephone and email and abetting misconduct. Gross misconduct however, takes the form of a far more serious offence and includes activity such as intoxication during work hours, being convicted of a criminal offence other than a misdemeanour, tampering and destruction of official documents, sexual harassment and threatening or physically assaulting other staff.⁸⁰

If the officer does not furnish a reply to the charges or fails to exculpate themselves in the opinion of the Chief Justice, the Chief Justice will submit copies of the statement of charge to the JSC which shall decide whether to proceed with the charges.⁸¹ Where the JSC contends that the disciplinary proceedings should go on, the Commission shall appoint a Committee or Panel charged with the task of investigating the matter. The Committee or Panel shall consist of at least three persons and should not include the Chief Justice.⁸²

Thereafter, the Committee or Panel shall give the officer a written notice of not less than fourteen days specifying the day on which they may be required to enter appearance with or

⁷⁷ Article 168 (2), Constitution of Kenya (2010).

⁷⁸ Section 19, Third Schedule of the Judicial Service Act (2011).

⁷⁹ Section 25(1), Third Schedule of the Judicial Service Act (2011).

⁸⁰ The Judiciary, 'Human Resource Policies and Procedures Manual', September 2014, 40-42.

⁸¹ Section 25(2), Third Schedule of the Judicial Service Act (2011).

⁸² Section 25(3), Third Schedule of the Judicial Service Act (2011).

without an advocate and to respond to the charges made against them.⁸³ Where witnesses are called, the Committee or Panel is required to give the judicial officer adequate time to cross examine them.⁸⁴ Following the investigation, the Committee or Panel shall forward its report to the JSC together with the record of the charges framed, the evidence produced, the defence relied on as well as any other proceedings relevant to the investigation. The report should include a statement as to whether in the Committee or Panel's judgement the charge or charges against the officer have been proved and their reasons, the details of any matters which in the Committee or Panel's opinion aggravate or alleviate the gravity of the case and a summing up to indicate the opinion of the Committee or Panel on the matter being investigated.⁸⁵ The JSC after considering the report may refer the matter back to the Committee or Panel if it is of the opinion that further investigation is required or alternatively, decide on the punishment, if any, which should be inflicted on the officer or further, decide, giving due regard to public interest, that the officer should retire from office.⁸⁶

The JSA also provides for the structure of proceedings for misconduct which do not warrant dismissal. The form of the proceedings is more or less the same as the proceedings for dismissal on the basis of misconduct which are discussed above. This is due to the fact that the Chief Justice is still responsible for filing the charges against officers where misconduct not warranting dismissal is alleged and the JSC is the sole body responsible for determining whether disciplinary proceedings should continue. The only difference between the two proceedings is that in the second, the proceedings are undertaken by the Registrar or by an officer senior to the officer accused following confirmation of further investigation by the JSC.⁸⁷

4.3 Evaluating the JSC's Powers of Appointment, Promotion, Discipline and Removal of Judges: A Comparison with International Law

The Universal Charter of the Judge which is a concerted effort by numerous judges around the world provides minimal norms that nations should seek to adhere to. Article 9 of the Charter relates to the appointment of judges and states that the selection and appointment of judges should be carried out according to objective and transparent criteria which are based on proper professional qualifications. This is mirrored within the Kenyan context as the JSC while

⁸³ Section 25(4) and Section 25(7), Third Schedule of the Judicial Service Act (2011).

⁸⁴ Section 25(5), Third Schedule of the Judicial Service Act (2011).

⁸⁵ Section 25(9), Third Schedule of the Judicial Service Act (2011).

⁸⁶ Section 25(10) and Section 25(11), Third Schedule of the Judicial Service Act (2011).

⁸⁷ Section 26, Third Schedule of the Judicial Service Act (2011).

evaluating the qualifications of the candidates before them has due regard to professional competence which takes the form of the elements discussed earlier on. To this extent therefore, both internationally and locally, a merit based appointment is preferred whereby judges are appointed based on the legal skills which they hold. Further, the JSC is guided by transparency when rendering appointments, a requirement which is in alignment with the international standards of utilising ‘objective and transparent criteria’ during the appointment of judges.

With regards to the promotion of judges, the best practices under international law have been to base it on objective factors particularly, ability, integrity and experience.⁸⁸ Other international instruments such as the European Charter on the Statute of Judges provide that promotion should be exclusively based on the qualities and merits observed in the performance of judicial duties by means of objective assessments.⁸⁹ Subsequently, it can be inferred that through the JSA’s requirement that consideration be had as to merit, ability, seniority, experience and official qualification, that the standards set internationally are met within the Kenyan context.

In relation to the discipline and removal of judges, the Universal Charter of the Judge provides that the administration of the judiciary and disciplinary action towards judges must be organized in such a way that it does not compromise the judges’ genuine independence and that attention is only paid to considerations that are both objective and relevant.⁹⁰ It further provides that disciplinary action against a judge can only be taken when provided for by pre-existing law and where it is in compliance with predetermined rules or procedure. The same is echoed under the European Charter which lays down guarantees on disciplinary hearings and stipulates that disciplinary sanctions can only be imposed on the basis of a decision taken following a proposal or recommendation or with the agreement of a tribunal or authority.⁹¹ Similar sentiments can be inferred from within the Kenyan context as the JSC cannot arbitrarily sanction judicial officers. A strict procedural method must be followed and specific grounds based on misconduct levelled against judges prior to their receiving sanctions. Further, the assessment of whether the misconduct alleged has been proven is up to the evaluation of an independent Committee or Panel and as such does not fall within the discretion of the JSC. In summary, the discipline and removal of judges is based on an objective evaluation.

⁸⁸ Principle 13, UN Basic Principles on the Independence of the Judiciary, 1985.

⁸⁹ Article 4.1, European Charter on the Statute of Judges, 1998.

⁹⁰ Article 11, Universal Charter of the Judge, 1999.

⁹¹ Article 5.1, European Charter on the Statute of Judges, 1998.

4.4 Conclusion

It is my contention that the JSC's powers of appointment, promotion, discipline and removal are at par with international best practices. As such Chapter Five shall seek to provide a further analysis of the JSC in particular the challenges preventing it from eradicating judicial corruption. The Chapter shall also seek to provide an analysis of the level of judicial corruption post 2010.

CHAPTER FIVE: JUDICIAL CORRUPTION POST 2010 AND THE CHALLENGES FACING THE JUDICIAL SERVICE COMMISSION

5.1. Reform Initiatives

With regards to transformation regimes implemented post 2010, the Judiciary Transformation Framework (JTF) was a crucial outline of the process which intended to reposition the judiciary as well as the entire governance, justice, law and order sector so as to be more responsive to the interests of the people.⁹² The Framework was formulated through a multi-stakeholder process which involved judges, magistrates, judicial officers and other stakeholders taking part in the judicial sector. The JTF highlighted the various areas which would be reformed between the years 2012-2016.

The Framework was based on four key pillars and ten overlapping key areas. On the one hand, the four key pillars involved: a people focused delivery of service; transformative leadership, organisational culture and professional, motivated staff; adequate financial resources and physical infrastructure and lastly, harnessing technology.⁹³ The first pillar included such actions as establishing customer care desks to answer questions, simplifying court procedures, creating a case management system and strengthening complaint mechanisms.⁹⁴ The second, focused on changing the judiciary's institutional culture, increasing training and clarifying individual's responsibilities while the third and fourth pillars sought to expand the court system, to computerize its procedures and to upgrade its Information Technology (IT) infrastructure.⁹⁵

The ten key areas on the other hand, included: access to and the expeditious delivery of justice; people centeredness and public engagement; stakeholder engagement; philosophy and culture; leadership and management; organisational structure; growth of jurisprudence and judicial practice; physical infrastructure; resourcing and value for money and harnessing technology as an enabler of justice. ⁹⁶

⁹² Ethics and Anti-Corruption Commission, 'A study on the Corruption and Ethics in the Judicial sector' October 2014, 13.

⁹³ Ethics and Anti-Corruption Commission, 'A study on the Corruption and Ethics in the Judicial sector' October 2014, 13-14.

⁹⁴ Maya Gainer, 'How Kenya Cleaned up its Courts,' 9th July 2016 < <http://foreignpolicy.com/2016/07/09/how-kenya-cleaned-up-its-courts/>> on 5th Feb 2018.

⁹⁵ <http://foreignpolicy.com/2016/07/09/how-kenya-cleaned-up-its-courts/> on 9th July 2016,

⁹⁶ Ethics and Anti-Corruption Commission, 'A study on the Corruption and Ethics in the Judicial sector' October 2014, 13-14.

Additionally, numerous attempts to eradicate judicial corruption in the form of enacting vast legislation on the competence of the JSC in ensuring that judicial processes are transparent and free of external interference were made. However, judicial corruption still continues to take place. The presence of judicial corruption prior to the establishment of the 2010 Constitution was discussed in Chapter One. The previous Chapter concluded by stating that the establishment of the JSC was intended to be the solution in ensuring a fair and transparent process of appointing and disciplining judicial officers and ultimately eradicating judicial corruption in the system. However, in the 2010 TI Global Corruption Barometer, 43% of Kenyans who sought services from the judiciary reported paying bribes.⁹⁷ Additionally, reports in the form of the East African Bribery Index Trends Analysis report indicated that the Kenyan judiciary is prone to corrupt practices at both grand and petty levels.⁹⁸ The report additionally stipulated that it registered the highest average size of bribes paid among similar institutions with an average size of a bribe as Kshs 7,885.⁹⁹ Further, on 3rd August 2015, Kenya's Chief Justice Willy Mutunga sounded the alarm that corruption was creeping back into the judiciary.¹⁰⁰ Owing to the prevalence of judicial corruption within the system public confidence in the judiciary declined. This is indicated in the study published by the Ipsos Syndicate Group in 2015 which provided that public confidence in the Supreme Court had fallen by 12% from November of 2012 while that in the High Court, local and magistrate courts had fallen by 7% across the country.¹⁰¹

This Chapter shall seek to provide an analysis of the causes of judicial corruption post 2010 and the challenges facing the JSC hence preventing them from eradicating judicial corruption.

5.2 Causes of Judicial Corruption

Prior to the enactment of the 2010 Constitution, the major challenge facing the judiciary was a lack of public confidence and a perceived general lack of competence that was demonstrated by the Post-Election intransigencies that led to the Post-Election Violence of 2007/2008.¹⁰²

⁹⁷ Transparency International, 'Global Corruption Barometer 2010' available at <https://www.transparency.org/gcb201011/>.

⁹⁸ Transparency International, 'The East African Bribery Index Trends Analysis (EABITA),' 2015.

⁹⁹ Transparency International, 'The East African Bribery Index Trends Analysis (EABITA),' 2015.

¹⁰⁰ Githongo J, Kenya's rampant corruption is eating away at the very fabric of democracy as seen on accessed on 20 November 2016.

¹⁰¹ Osaleh L, "Tackling Corruption in Kenyan judiciary," International Governance Institute -Annual General Meeting, Nairobi, 2015.

¹⁰² Hon Justice Richard Mwangi, 'Five Years After the Constitution of Kenya 2010: Reflections on the Role of the Judiciary and the Courts,' Annual Judges Law Conference, 2015, 2.

In 2014, the Ethics and Anti-Corruption Commission (EACC) published a study on Corruption and Ethics in the Judicial Sector. The Study showed that judicial officers acknowledged the practice of payment of bribes to hide files (35%), abuse of office (24%), bribing the judges, prosecutors and clerks for favourable judgement (19%) as forms of corruption in the sector.¹⁰³ The EACC Study also indicated that 41% of the court users cited absenteeism as a form of corruption encountered followed by bribery in order to hide files approximated at 36% and favouritism at 34%.

While the EACC Study took note of some activities that reduced corruption which included amongst others open days, the creation of Court User's Committees (CUCs), trainings, the promulgation of the new Constitution, peer review committees, openness in recruitment and the suspension of corrupt personnel, it also mentioned a number of reforms that failed to reduce corruption. One such reform that failed to reduce judicial corruption is the improvement of remuneration with the aim of combating corruption. The EACC noted that this particular reform failed to curb the vice as corruption is not connected to the question of remuneration but is one of personal choice. Another failed reform mentioned within the EACC Study is the mass transfer of magistrates who are corrupt from one station to another as they merely took their habits to the next station.¹⁰⁴

The Kenya Vision 2030 requires a transparent and accountable system of governance that is expected to promote integrity, free flow of information and enhance the accountability of leaders.¹⁰⁵ Drawing from this, it is apparent that judicial corruption cannot be prevented without the presence of a transparent judicial system, judicial independence and the accountability of judicial officers. Yet, when asked to give opinions regarding transparency in the judicial sector, fifty-six percent of judicial officers indicated that there was inaccessibility to case audit and service charter whereas forty percent noted that there was limited access to information by the public.¹⁰⁶

¹⁰³ Ethics and Anti-Corruption Commission, 'A study on the Corruption and Ethics in the Judicial Sector' October 2014, xix.

¹⁰⁴ Ethics and Anti-Corruption Commission, 'A study on the Corruption and Ethics in the Judicial Sector' October 2014, 53.

¹⁰⁵ Ethics and Anti-Corruption Commission, 'A study on the Corruption and Ethics in the Judicial Sector' October 2014, 25.

¹⁰⁶ Ethics and Anti-Corruption Commission, 'A study on the Corruption and Ethics in the Judicial Sector' October 2014, 26.

Further, with regards to judicial independence, the EACC Study sought the opinion of court users. Fifty-one percent claimed that there was political interference in the system.¹⁰⁷ Another tally on a differing question revealed that 41% of court users believed that the judiciary only worked for the rich and powerful. Arguably, a lack of transparency and judicial independence in the judicial system are a number of factors still plaguing and influencing judicial corruption.

5.3 Challenges Facing the JSC

Arguably, despite the major reforms that have been undertaken to strengthen the JSC, there are still challenges both in the statutory framework and in practice which impede the JSC's competence. One such statutory challenge of the JSC is the over representation of members of the judiciary in its composition.¹⁰⁸ The JSC consists of eleven members, five of whom are judicial officers. This is considered to be an over kill especially when you factor in the Attorney General who is an appointee of the President and appreciate the two members who represent the public as being further appointees of the President.¹⁰⁹ Arguably, this creates a situation whereby the executive and its employees have a big say in the composition of the JSC and the broader administration of justice.¹¹⁰

The previous JSC was heavily criticized by the African Peer Review. The critique was made in relation to the terms of appointment provided in Article 69 of the Repealed Constitution which were considered vague. This was with regard to the requirements relating to the qualifications, integrity and experience of proposed judges which allowed the executive and in particular, the President to exercise considerable influence over the appointment process. The African Peer Review claimed that this compromised judicial independence and more so, the role of the JSC thus providing a loophole in the Constitution for the executive to influence the appointment, promotion and dismissal process of judges.¹¹¹ This was rectified in the appointment regimes enacted in the Judicial Service Act particularly owing to the fact that the President's role is viewed as being purely ceremonial as was the case in April 2011 after the

¹⁰⁷ Ethics and Anti-Corruption Commission, 'A study on the Corruption and Ethics in the Judicial Sector' October 2014, 28.

¹⁰⁸ Professor Christine Mango, Vice Chairperson of the Judicial Service Commission of Kenya, 'Policy Direction and Administration of the Judiciary by the Judicial Service Commission: A New Dawn, A Fresh Paradigm,' Kenya Law Journal, 2011.

¹⁰⁹ Professor Christine Mango, 'Policy Direction and Administration of the Judiciary by the Judicial Service Commission,' 2011.

¹¹⁰ Professor Christine Mango, 'Policy Direction and Administration of the Judiciary by the Judicial Service Commission,' 2011.

¹¹¹ African Peer Review Mechanism: Country Report on the Republic of Kenya, May 2006, p86 <<http://www.nepard.org/2005/files/aprm/APRMlenyareport.pdf>> accessed 5th February 2017.

President withdrew his nomination of Justice Alnasir Visram as the Chief Justice and deferred the matter to the JSC who then conducted public interviews of the candidates shortlisted for the offices.¹¹²

Nevertheless, the appointment procedures provided for under the JSA have continued to be the subject of criticism. One such critique is that by granting the JSC exclusive powers to appoint promote and discipline judges, the Constitution has given the Commission too much power that can in essence be deployed against individual judges to the point of interfering with their judicial independence.¹¹³

As for the aspect of practice, it is apparent from the EACC Study that the judiciary, the third branch of the government which is supposed to be the arbiter of right and wrong and which is ideally supposed to be immune from the scourge of corruption is not impervious to the vice. The EACC Study revealed that judicial corruption continues to take place within the judiciary with bribery being the key form of judicial corruption followed closely by abuse of office. Indeed, not too long ago, Justice Phillip Tunoi was alleged to have accepted a \$2 million bribe in order to rule in favour of former governor of Nairobi, Dr Evans Kidero.¹¹⁴

It is thus apparent that while the 2010 Constitution and the JSA have taken strides in emboldening the JSC, there are still challenges both in the statutory framework and in practice which serve as an impediment to the mandate of the JSC. The next and final Chapter shall thus endeavour to draw conclusions in the study and to provide recommendations on the plausible means of strengthening the JSC and how to best prevent judicial corruption from continuing.

¹¹² Rosaline Akinyi Oganyo, 'Justiciability of Justice: The Role of Judicial Service Commission in Kenya in the Decisional Independence of Judicial Officers,' Published LLM Thesis, University of Nairobi, Kenya, October 2014, 31.

¹¹³ Rosaline Akinyi Oganyo, 'Justiciability of Justice,' 32.

¹¹⁴ Washington Osiro, 'Corruption in Kenya: Supreme Court Judges Accused of Accepting Millions in Bribes,' https://www.huffingtonpost.com/washington-osiro/corruption-in-kenya-supreme-court_b_9154580.html on 18th Feb 2018.

CHAPTER SIX: RECOMMENDATIONS AND CONCLUSIONS

6.1 Recommendations

Firstly, there needs to be a creation of public awareness so that members of the public are aware that there are certain rules of procedure and laws that guide judicial proceedings. This would ensure that there is a shift in attitude thus eradicating social and cultural tolerance towards corruption. Furthermore, conferences and workshops between members of the judiciary and members of the public should be held such that ideas on how best to tackle corruption are brought to the table and implemented.

Secondly, amnesty and whistle blowing provisions should be enacted in legislation so as to deter social and cultural acceptance of corruption. Whistle blowing provisions would protect judicial staff that come to report on judicial corruption from retaliatory action for voluntarily disclosing information about dishonest or illegal activities occurring within the various arms of government particularly, the judicial organ. Amnesty, on the other hand would seek to offer parties involved in judicial corruption who self report and hand over evidence—either total immunity from prosecution or a reduction in the penalty which would have otherwise been imposed on them had they not been the first to self-report themselves. The parties’ co-perpetrators would however be held completely liable. Conclusively, amnesty and whistle blowing policies seek to give incentives to members of strategic judicial corruption mechanisms to confess and aid law enforcement officers. Ultimately, their aim is to drive a wedge through the trust and mutual benefit at the heart of judicial corruption cartels by rewarding a few whistle-blowers with a reduction in penalties.

Another recommendation is that the judiciary be vested with authority in order to comply with the separation of powers provisions stipulated under the 2010 Constitution. This in particular relates to the core functions which are interrelated and carried out as between the judiciary, executive and legislature. The government should seek to promote the independence and impartiality of the judiciary by delinking the executive and legislature from the judicial organ. Furthermore, there should be security of tenure within the judiciary which can be achieved through the strengthening of the implementation of the judiciary service fund. The objectives of the fund are to safeguard the financial and operational independence of the Judiciary; ensure accountability for funds allocated to the Judiciary; and ensure that the Judiciary has adequate

resources for its functions.¹¹⁵ Indeed, these objectives illustrate the need for security of tenure within the judiciary. Thus, practically implementing the fund would serve to ensure judicial independence.

6.3 Conclusion

Chapter one provided an overview of the study. It further indicated the existence and prevalence of corruption within the judiciary beginning from the establishment of the judiciary and going up to present times where the vice was stated as having crept back into the judicial system.¹¹⁶ Chapter two discussed the conceptual framework of the study and attributed judicial corruption as existing at both grand and petty levels. The chapter also factored in the lack of judicial independence and adequate separation of powers mechanisms as contributing to the prevalence of judicial corruption in the Kenyan judiciary.

Chapter three of the study provided an overview of the history of the JSC with chapter four providing a further analysis of the JSC's powers of appointment, promotion, discipline and removal of judges. Chapter Five illustrated the initiation of further judicial reforms post 2010 after the promulgation of the 2010 Constitution such as the creation of a judicial code of conduct, the use of ICT in case management and payment of court fees, public awareness and creation of court users and peer review committees. The chapter also provided an analysis of the causes of judicial corruption and the challenges facing the JSC thus preventing it from eradicating judicial corruption. It concluded by stating that although various reform mechanisms had been taken to strengthen the JSC, there still exist some challenges both within the statutory framework and in practice which impede the mandate of the JSC.

The previous Chapters have thus revealed that the judiciary is on a transformation path. They also recognised the need for the stakeholders in the justice system to work together to improve the judiciary and the methods of attaining justice. Additionally, the study has achieved all the objectives it set out to do. It set out the causes of judicial corruption over the years. It also identified the various challenges facing the JSC and preventing from properly addressing the issue of judicial corruption. Moreover, the study made recommendations on how to improve the existing framework on judicial corruption. It further illustrated that although the mandate

¹¹⁵ Section 3, Judiciary Fund Act No. 16 of 2016.

¹¹⁶ Benard Sanga, 'A Third Purge? CJ Willy Mutunga and Lawyers Decry Increase Corruption in the Judiciary,' accessible at < <http://www.standardmedia.co.ke/article/2000172075/a-third-purge-cj-willy-mutunga-and-lawyers-decry-increase-corruption-in-the-judiciary>> on August 8th 2015.

of the JSC has been strengthened over the years, there is still some work which needs to be done in order to better the system.

The study also confirms its hypothesis that the mandates of the JSC are ineffective in solving the problem of judicial corruption. It then concludes by stipulating that the JSC is at present not properly utilising the mandates accorded to it. Indeed, further work needs to be implemented on the JSC before judicial corruption can be properly dealt with.

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